DOCUMENT RESUME

ED 331 454 HE 024 519

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TITLE Legal Issues Regarding Curriculum: What Administrators Need To Know about Curriculum and Its Delivery.
PUB DATE 3 Apr 91
NOTE 19p.
PUB TYPE Guides - Non-Classroom Use (055) -- Information Analyses (070)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *College Administration; College Students; *Contracts; Court Litigation; Disabilities; Discipline; Educational Malpractice; Higher Education; Institutional Role; *Legal Problems; *Legal Responsibility; Program Termination; *Student College Relationship; *Student Rights

ABSTRACT

This paper focuses upon a variety of curriculum related issues that have potential legal connotations, such as whether the college bulletin forms a contract, whether advertisements can be considered contracts, and determining the appropriateness of student discipline for academic and other reasons. Presented first is a brief overview of contract law and an explanation about express contracts. Discussions that follow the overview cover the following topics: (1) implied promise or quasi-contract; (2) termination of programs; (3) discipline and expulsion; (4) educational malpractice; and (5) provisions for handicapped individuals. It is noted that the courts will use contract law in the resolution of student-university issues when it is appropriate. Further, courts have continually stated that the administration of educational programs and activities belongs in the hands of the educators and, so long as any abuse of educational rules and regulations is absent, the courts will defer to the educators. Students, on the other hand, must be able to meet all the requirements of the programs that they wish to enter; this includes both academic and non-academic requirements. Contains 23 references. (GLR)

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LEGAL ISSUES REGARDING CURRICULUM

What Administrators need to Know about Curriculum and Its Delivery

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What Administrators need to Know about Curriculum and Its Delivery

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Now, more than ever, administrators are concerned about the legal ramifications of their actions. Program and curricular decisions are often made with a view toward the potential legal issues and problems that might arise. This paper will focus upon a variety of curriculum related issues that have potential legal connotations, such as whether the school bulletin forms a contract, can advertisements form contracts and the appropriateness of student discipline for academic and other reasons. Since so many of these issues have been approached in courts from the view of contract law, a brief overview of contract law seems appropriate.

Contract Issues

The term contract is used a lot, but what exactly is a contract. While a contract has legal implications, no entirely satisfactory definition of the term has ever been developed. Every contract involves at least one promise that has legal implications, but this promise is coupled with other elements such as transfers of property interests or behavioral acts. A contract is often defined as a legally enforceable agreement. However, certain kinds of contracts may be formed without the presence an agreement.

Recognizing all the liabilities present when one attempts to simplify a complex and extensive body of law, for the purpose of this paper, a contract will be defined as a legally binding agreement which contains three elements. There must be an **offer** made by one party followed by an **acceptance** of the offer by the other party. This process is called mutual agreement. Finally, there must be an exchange of **consideration**, which means that something is given for something.

Contracts may be classified as **express contracts** when both parties manifest their agreement by words or, **implied by fact** when an agreement is manifested by conduct. For example, when you call a repairman to come to your house and fix something, it may be inferred that you have agreed to pay the repairman a reasonable fee for his services. Because both words and actions are involved, your request and the plumber's actions, this contract is partly express and partly implied in fact. Finally, a contract may be **implied in law** when an obligation is imposed by law to do justice even though it is clear no promise was ever made or intended. This is also called a **quasi-contract**. To illustrate, if a physician provides necessary medical care, even without permission, the physician may recover the value of the services rendered. For further information, see Caliamari and Perillo[1].

Express Contracts

One question frequently asked is, "Does the school bulletin constituted an express contract?" The answer is, yes, somewhat and

sometimes. Perhaps the following examples of cases will serve to illustrate how this issue has been treated by the courts.

In Steinberg v. Chicago Medical School,[2] the student mailed his application, along with the required fee, and requested admission to the medical school program. The student was not accepted and so he sued under breach of contract for admission. The court reasoned that the student and the school entered into an enforceable contract; that the school's obligation under the contract was stated in the school's bulletin in a definitive manner and that by accepting his application fee - a valuable consideration - the school bound itself to fulfill its promises; that is, he was entitled to have his application judged according to the school's stated criteria. Therefore, using contract law, Chicago Medical School was not required to admit Steinberg, but was required to judge his application according to the policies stated in its bulletin.

Catalog or bulletin statements do not impose a promise to graduate the student if he or she is admitted. According to the decision rendered in Giles v. Howard University,[3] under the contract (a Student Promotions Policy), the standard imposed upon a university is that of reasonable expectation. The University reserved to itself the right to dismiss a student who failed a class and did not succeed in removing the deficiency through the Directed Study Program. It seems apparent, therefore, that it also reserved the right to require such a student to comply with any reasonable condition to retain his student status. The reasonable

expectation of any student is that if he fails a course and does not make up the deficiency . . . , he can be dismissed or can be retained upon compliance with any reasonable condition.

Likewise, when Georgia State University refused to award a student her master's degree in education, the court[4] sided with the university. The court held that the "university has an interest to eliminate the ongoing stigma of erosion of their academic certification process . . . (and a) wide latitude and discretion (is) afforded by the courts to educational institutions in framing their academic degree requirements. The university is clearly entitled to modify its rules and regulations so as to properly exercise its educational responsibility."

Student course syllabus, handouts, teacher competency and judgment in grading have been called in question by students. As an example, Ilene Ianiello enrolled in a required teacher education course, completed the course with an "A" grade and subsequently sued to recover damages for breech of contract and fraudulent misrepresentation. Her complaint was that the university did not provide the course described in the catalog and she did not learn anything in the course. The lone course requirement was to hand in one book report and all students enrolled in the required course received "A" grades. Therefore, the course received was worthless and of no benefit to the plaintiff. Also complaints about the instructional mode and the absence of tests and evaluation were included in the suit. The suit failed.[5]

Some students have taken statements regarding the usual time

periods required for completion of a program as a contractual agreement and have protested prerequisite requirements. These two issues were addressed in Paoli v. University of Delaware[6] with the following resolution. A university requirement that successful completion of a prerequisite course before enrolling in a course required for successful completion of her program did not make arbitrary and capricious treatment nor deprive the student of due process. A student does not enjoy an absolute right to complete a program of study within the "usual" time period.

Construction of Terms

When reviewing contract issues, the courts are faced with the task of determining what terms exist and the meaning of these terms. When resolving the issue of terms, the courts use several principles, such as: (1) the ordinary meaning of language; (2) technical meaning of technical terms; (3) interpreting the writing as a whole; (4) taking all circumstances accompanying the transaction into consideration; and (5) the conduct of the parties.[7] The following legal actions serve to illustrate this process.

Cornell University had a statement in its college bulletin that satisfactory completion of an academic program was required for graduation without the mention of a specific grade point standard. Balogun completed all academic courses specified for the program but with a grade point average less than that required by the university. After receiving notification from Cornell of the

unsatisfactory grade point average and a subsequent inability to graduate, Balogun filed suit claiming a breach of contract. The court[8] held that ". . . a grade point standard applied to the plaintiff did not add an additional requirement for graduation to those set out in the college bulletin . . . [and] the determination of whether or not a student had done satisfactory or unsatisfactory work was not based upon any set percentile grade but rather upon the appraisal of the student's record and potential, which was a clear reservation of a right of review possessed by the university."

In Basch v. George Washington University,[9] students sued to set aside tuition increases relying upon examples of past increases contained in the bulletin and the university's statement that it will make every effort to keep future tuition increases within these limits. The court held that when "construing the terms of a contract, the document itself must be viewed as a whole, considering not only the language used in the contract, but also the circumstances surrounding the making of the contract. An offer must be so definite in its terms, that the promises and performances to be rendered by each party are reasonably certain." Thus, the examples and statement were simply examples and the expressions of intent, not part of a contract.

Implied Promise or Quasi-Contract

Students have sued universities for the failure to provide courses that lead to completion of accredited programs and failure

to provide for completion of a degree when a program of study is terminated by the board of trustees or regents. Courts have looked at these issues as an implied promise or quasi-contract. While courts have not forced universities to continue programs that they choose to terminate, they have looked at issues regarding reasonableness of the termination or the courses provided in a program. Another issue arising under the implied promise or quasi-contract revolves around the discipline of students for conduct other than academic failure. Here, again, courts have supported the universities. The following cases are illustrative of the legal process in these issues.

Termination of Programs

In Behrend v. State,[10] the university experienced problems in maintaining accreditation of its architecture degree program and decided to remove the program from its offerings because of lack of accreditation. Students who were enrolled in this program had difficulty in transferring to other institutions with an architecture program and did not qualify for the architecture professional examination. The court reasoned, students must be provided accredited academic training, but this does not mean the board of trustees is powerless to discontinue certain programs or departments. The course materials and hours of credit toward a degree must be acceptable to another school upon transfer, or qualify the student for the professional examination necessary for professional work, or not delay the process of transfer to another

college or university offering an accredited course of study. Failure to do so meant the university would be liable for damages to the students so injured.

A Montana vocational education program leading to a pilot's license was terminated because of funding cutbacks before all students had an opportunity to complete their training. The court found there was an implied contract that enrolled students would be given an opportunity to complete the training period of six quarters and to receive a diploma evidencing such completion and awarded damages to the students. However, the case was reversed because of state immunity issues.[11]

Discipline and Expulsion

Students are disciplined through suspension or expulsion for a variety of reasons other than academic failure. Include among the categories used for discipline are violations of ethical standards, failure to comply with codes of conduct, dissatisfaction with personal hygiene, unacceptable field work and unprofessional conduct. In general, absent any bias, willful or malicious intent, courts have upheld the disciplinary action. The following examples are illustrative of the legal actions and their results.

Information sent to prospective and new students contained statements that all faculty committees had student membership. Gold was expelled from school and appealed before the faculty committee that reviewed such issues. This committee did not contain any student members and, after a unsuccessful appeal, Gold

filed a suit based on fraudulent misrepresentation and breach of contract. The court[12] reasoned that the omission of a student from the academic status committee was not an oversight but a practice designed to prevent students from learning the contents of another student's file. Therefore, this practice did not constitute fraudulent misrepresentation of statements in brochures indicating all faculty committees had a student representative.

A doctoral student realized that the publication of scientific papers was essential for his future professional advancement. After several unsuccessful attempts at publishing work he completed at another institution, he resubmitted the paper with the addition of his doctoral advisor's name. This action was taken because the advisor was an recognized authority and the student believed it would enhance the chances for his paper's publication. He did not ask his advisor for permission to add his name to the paper nor did his advisor ever review the manuscript. Upon discovery, the student was disciplined by Brigham Young University for a violation of the rules of conduct and ethical standards rather than a failure to meet academic requirements. Slaughter brought suit under a breach of contract action. According to the court,[13] the student-university relationship is unique and it should not be and cannot be stuffed into one doctrinal category, namely commercial contract doctrine. Even the many cases which refer to a contractual relationship existing between the student and university, especially private schools, do not adopt all commercial contract law by their use of certain elements. The use of ethical standards

was a legitimate act on the part of the university.

A medical student, after being terminated from her course of study, brought legal action charging lack of due process because of an academic dismissal without a hearing. The court[14] determined the following facts applied to their decision. After being advanced to her final year of medical school on a probationary basis, after being informed by letters or in meetings with the dean of the medical school of faculty dissatisfaction with her clinical performance and of a recommendation that she be dropped from school unless there was radical improvement in her clinical competence, peer and patient relations, personal hygiene and ability to accept criticism, the student was notified that she was being dropped from medical school following unfavorable performance on oral and practical examinations. The student filed a written appeal and the decision to drop her was approved by the provost. The court held that the student was duly informed of the faculty's dissatisfaction and the danger to her graduation and the ultimate decision to terminate her program was careful and deliberate. Further, she had been awarded at least as much due process as the Fourteenth Amendment required because when a student fails to meet academic standards, the due process clause does not require a hearing in dismissal for academic causes.

The need for acceptable performance in the field instruction, as well as the academic course instruction, has been supported by the courts. For example, the court in Bower v. O'Reilly[15] held that affidavits submitted by faculty members, advisors, instructors,

director of field instruction and the Dean of The school of Social Welfare all attested to the fact that the student's performance in prescribed field work was unsatisfactory and that he should not be continued in the course in which he was enrolled. Therefore, the student was not a student in good standing and his suspension from further study at The School of Social Welfare was not abuse of discretion. When a university, in expelling a student, acts within its jurisdiction, not arbitrarily but in exercise of honest discretion based on facts within its knowledge that justify exercise of discretion, a court may not review the exercise of its discretion.

Dismissal for poor interpersonal relations and unprofessional conduct were the focus of legal action in Depperman v. University of Kentucky.[16] A medical student brought action against the state university and medical school officials, challenging their actions leading to his unwilling departure from student ranks. This action revolved around a student regulation purporting to insure conduct becoming potential physicians; specifically, the suspension was based on a demonstrated inability to function effectively with other people and an indication that psychiatric counseling would be a prerequisite to consideration of readmission. The district court held that claimed deprivations which occurred prior to the medical student's actual suspension by the medical school committee were not generative of a federal cause of action. Generally, courts will not interfere with operations of college and universities, especially in actions challenging the institution's regulation of

the academic sphere of campus life, a domain in which the courts possess minimum expertise.

A similar situation was the focus in Connelly v. University of Vermont[17] and the result was identical. The court supported the university's suspension of the student, stating a medical school must be the judge of the qualifications of its students to be granted a degree. The question, ". . . was the student in fact delinquent in his studies or unfit for the practice of medicine? . . . is not a matter for judicial review."

Perhaps the best illustration of how courts view academic and other regulations is provided by statements contained in the following two federal decisions. According to Esteban v. Central Missouri State College,[18] college regulations are not judged by the degree of specificity required for penal statutes. Likewise, the court in Lowery v. Adams[19] indicated that regulations defining student conduct "are not used in a vacuum", but must be interpreted in the context of their intended import.

Educational Malpractice

From time to time, cases alleging "educational malpractice" have been put forth. Usually these issues have revolved about "improper placement and/or instruction" in the public schools. However, at least two cases involved action claiming educational malpractice against institutions of higher education. In one, an action was brought against the director of medical education for educational malpractice brought by a physician who had just begun

his internship at a hospital and was involved in a tort action. The physician claimed the situation was the result of educational malpractice that occurred during his medical training. In the other, a suit was brought against a state university after a graduate of its law school failed to pass the state bar examination on three occasions.

Courts have been remarkably consistent in their approach to "educational malpractice." Consistently, the courts have held that for an action in educational malpractice to exist, there must be a standard with which an educator's performance for each child can be judged and proximate cause must show that the failure for a given child to obtain the performance standard was due to the teacher's or school's failure to perform. Schools have not been charged with the legal duty to develop a performance standard for each student and the proximate cause issue poses many problems. The court in Donohue[20] observed . . . "proximate causation . . . might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process . . ." (at 1353-4). These collateral factors include such issues as the student's disinterest or lack of motivation, little or no parental support, failure to complete homework, poor attendance or tardiness, and a lack of study space and materials at home. In other words, a student's academic performance is influenced by a host of factors beyond the control of the schools.

Not only has the approach to educational malpractice been consistent, but the results have also been the same. To date, no

educational malpractice actions that were reviewed have prevailed. The courts have found for the defendants in one of two ways. Following the first approach, several courts[21] have held there is no cause of action stated in educational malpractice suits against either the public schools or universities. Using the second approach, several other courts[22] have held that such a cause of action is "not cognizable in the courts as a matter of public policy."

Provisions for Handicapped Individuals

Public Law 94-142, Education for All Handicapped Children (20 USCS 1401 et seq.), sets the policies for education of children in public schools up to the age of 21 years. The requirements of this law are reasonably tightly drawn, indicating to school districts what basic education the children qualified under its provisions must receive. Section 504 of the Rehabilitation Act of 1973 (29 USCS Section 794) prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap." This legislation is the basic controlling statute setting the standard for colleges and universities because of their participation in a variety of federally funded programs. A U.S. Supreme court decision[23] defined the legal limits of this prohibition of discrimination based on handicap. According to the court, Section 504 imposes no requirement upon an educational institution to lower or effect substantial modifications of its standards in order to accommodate

handicapped persons and (2) the institution's unwillingness to make major adjustments in its nursing program to accommodate the individual did not constitute unlawful discrimination. An "otherwise qualified" person is one who is able to meet all the requirements of a covered program in spite of his handicap.

Summary

Several issues seem clear after this review. First, the courts will use contract law in the resolution of student-university issues when it is appropriate. However, contract law will not be rigidly applied as the courts will allow liberal and reasonable interpretations of the university regulations. A caveat exists in that if procedures are specified in official university publications, they must be followed. Universities are able to enforce both academic and reasonable conduct standards provided such enforcement is not based on willful and malicious intent.

Courts have continually stated that the administration of educational programs and activities belongs in the hands of the educators and, absent any abuse of educational rules and regulations, the courts will defer to the educators. It must be mentioned that while educators retain control over the programs, courses must meet accreditation standards, be readily transferable to other schools and enable students to qualify for professional examinations. Institutions can discontinue educational programs but there is an inferred promise that reasonable provisions will be made so students who are already enrolled in the program will be

able to complete their course of study within a reasonable time.

Finally, universities need not accept all students who apply for entry into their programs. When accepting new students, the institutions must follow their published procedures. Students, on the other hand, must be able to meet all the requirements of the programs that they wish to enter; this includes both academic and non-academic requirements.

References

[1]Caliamari and Perillo, Contracts. St. Paul: West Publishing, 1970.

[2]Steinberg v. Chicago Medical School, 354 N.E.2d 586 (Ill. 1976).

[3]Giles v. Howard University, 428 F.Supp. 603 (1977).

[4]Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976).

[5]Ianiello v. University of Bridgeport (1974) as cited in "Newsnotes," Phi Delta Kappan, 56:577 (April, 1975) and "NewsBriefs," Phi Delta Kappan, 59:75 (September, 1977).

[6]Paoli v. University of Delaware 695 F.Supp 171 (Del. 1988).

[7]Schaber and Rohwer. Contracts. St. Paul: West Publishing, 1984. pages 225 - 226.

[8]Balogun v. Cornell University, 333 N.Y.S.2d 838 (1971).

[9]Basch v. George Washington University, 370 A.2d 1364 (D.C., 1977).

[10]Behrend v. State, 379 N.E.2d 617 (Oh. 1978).

[11]Peretti v. State of Montana, 464 F.Supp. 784, (Mont. 1979), reversed 661 F.2d 756 (9th Cir. 1981, 1982).

[12]Gold v. University of Bridgeport School of Law, 562 A.2d 570 (Conn. 1989).

[13]Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir. 1975).

[14]Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 55 L.Ed.2d 124, 98 S.Ct. 948 (1978).

[15]Bower v. O'Reilly, 318 N.Y.S.2d 242 (1971).

[16]Depperman v. University of Kentucky, 371 F.Supp. 73 (1974).

[17]Connelly v. University of Vermont, 244 F. Supp. 156 (1965) at 159.

[18]Esteban v. Central Missouri State College, 290 F. Supp. 622 (1968), aff'd 8th Cir., 415 F.2d 1077 (1969), cert. denied, 398 U.S. 965, 90 S.Ct. 2169, 26 L.Ed.2d 548 (1970).

[19]Lowery v. Adams, 344 F.Supp. 446 (W.D.Ky, 1972).

[20]Donohue v. Copiague Union Free School District, 391 N.E.2d. 1352 (N.Y., 1979).

[21]Tubell v. Dade County Public Schools, 419 So.2d 388 (Fla. 1982.); De Rosa v. New York, 517 N.Y.S.2d 754 (1987); Doe v. Board of Education of Montgomery County, 453 A.2d 814 (Md., 1982); Huckabay v. Netterville, 263 So.2d 113 (La, 1972), a suit against a state university after failing to pass state bar examination on three occasions.

[22]Donohue v. Copiague Union Free School District, 391 N.E.2d. 1352 (N.Y., 1979); Hunter v. Board of Education 425 A.2d. 681 (Md., 1981) affd in part and revd in part on other grounds 339 A.2d 582; Hoffman v. Board of Education, 424 N.Y.S.2d 376 (1979); Syidryk v. St. Michael's Medical Center, 493 A.2d 641 (N.J. 1985), a suit against director of medical education for educational malpractice brought by a physician who had just begun his internship at a hospital was involved in a medical malpractice suit.

[23]Southeastern Community College v. Davis 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct.2361 (1979).